No. 85-1806

Supreme Court, U.S.
FILED
MAY 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-5694
* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33214—75—5-2-86)

321

QUESTIONS PRESENTED

1. For purposes of determining whether Eleventh Amendment immunity bars a pendent state claim, does federal law govern the question of whether the State is the real party in interest even though state law supplies the substantive rule of decision?
2. Whether Article III's grant of federal jurisdiction authorizes the Court of Appeals to reinstate previously dismissed pendent state law claims against certain defendants where plaintiffs failed to appeal the District Court's dismissal of the underlying federal claims against those defendants?
3. Whether the Court of Appeals erred in ruling that the District Court abused its discretion by dismissing plaintiffs' pendent claims on the alternative ground that combining Eighth Amendment and common law negligence claims for trial might lead to jury confusion and was impractical?

LIST OF PARTIES

The following is a list of all parties involved in this Petition for a Writ of Certiorari.

A. PETITIONERS:

1. Gayle Franzen, in his capacity as Director of the Illinois Department of Corrections.
2. Dennis J. Wolff, in his capacity as Warden of Joliet Correctional Center.
3. Richard R. Hert, in his capacity as Chief of Security of the Joliet Correctional Center.
4. William M. Hartgrove, in his capacity as correctional officer.
5. James A. Krug, in his capacity as correctional officer.
6. John B. Tipton, in his capacity as correctional officer.

B. RESPONDENTS:

1. Junior Ray Duckworth
2. William Woodward
3. Michael Mullins
4. Daniel Hines
5. Freddie Brown
6. Emmett Leatherwood
7. Rudolf Moffett
8. Robert Osborne
9. Ben Cantrell
10. James Long
11. James Tirrell
12. Theodore Tirrell
13. Sherman Tirrell
14. Charles Campbell
15. Dresden Faulkner
16. Dennis Walker
17. Michael Rucker
18. Ward Quaco
19. Stanley Lathrop
20. Robert Foster
21. LaMont Hurrins

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	5
1. Claims Brought By The Prisoners	5
2. Proceedings On The Pendent Claims In The District Court	7
3. The Court Of Appeals' Decision On The Pendent Claims	9
REASONS FOR GRANTING THE WRIT:	
THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO RESOLVE WIDELY CONFLICTING DECISIONS CONCERNING RECURRING ELEVENTH AMENDMENT AND ARTICLE III JURISDICTIONAL ISSUES AS WELL AS SET FORTH THE PROPER SCOPE OF REVIEW OF DISCRETIONARY DISTRICT COURT DECISIONS DISMISSING PENDENT STATE CLAIMS	11
I.	
THE LOWER COURT'S HOLDING THAT FEDERAL LAW GOVERNS WHETHER A STATE IS THE REAL PARTY IN INTEREST ON	

STATE LAW CLAIMS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND LEADS TO A DIFFERENCE IN SUBSTANTIVE OUTCOME DEPENDING UPON THE FORUM CHOSEN BY PLAINTIFFS 13

A. Widely Disparate Holdings Exist Among The Lower Courts And This Court Concerning Whether The State Is The Real Party In Interest In The Context Of State Law Claims 13

B. The Lower Court's Holding Returns The Litigation Of Pendent State Claims Against State Employees To The Days When Forum Shopping Prevailed Under *Swift v. Tyson* 14

C. This Court's Concern In *Erie R. v. Tompkins* With Mischievous Results Applies Even More Strongly To The Sensitive Issue Of A State's Duty To Provide Adequate Prison Security 17

II.

THE COURTS OF APPEALS REQUIRE THIS COURT'S GUIDANCE CONCERNING THE CONSTITUTIONALITY OF REINSTATING PREVIOUSLY DISMISSED PENDENT CLAIMS WHERE THE UNDERLYING FEDERAL CLAIMS HAVE NOT BEEN APPEALED .. 18

III.

CONFUSION EXISTS AMONG THE COURTS OF APPEALS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED A DISTRICT COURT'S DECISION TO DISMISS PENDENT STATE CLAIMS FOR PRACTICAL REASONS . 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases	Page
Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972) ...	13
Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981) .	21
Bell v. Wolfish, 441 U.S. 520 (1979)	18
Bender v. Williamsport Area School District, 475 U.S. ____, 106 S.Ct. 1326 (1986)	11, 19, 20, 23
Brandon v. Holt, 469 U.S. ____, 105 S.Ct. 873 (1985)	15
DeLong Corp. v. Oregon State Highway Commission, 233 F.Supp. 7 (D. Ore. 1964), *aff'd*, 343 F.2d 911 (9th Cir.), *cert. denied*, 382 U.S. 877 (1965)	13
Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985)	*passim*
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) ..	11, 16, 17
Estelle v. Gamble, 429 U.S. 97 (1976)	12
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945)	14
Harris v. Pennsylvania Turnpike Commission, 410 F.2d 1332 (3d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970)	13
Hoffman v. Yack, 57 Ill.App.3d 744, 373 N.E.2d 486 (5th Dist.), *leave to appeal denied*, 71 Ill.2d 603 (1978)	15
Korgich v. Regents of New Mexico School of Mines, 582 F.2d 549 (10th Cir. 1978)	13

Laningham v. United States, 2 Cl. Ct. 535 (1983) . 11

Moor v. County of Alameda, 411 U.S. 693 (1973) . 21, 22

Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Maryland, 756 F.2d 986 (4th Cir. 1985) . 19

Palmer v. State of Ohio, 248 U.S. 32 (1918) ... 14

Parden v. Terminal R. of Alabama State Docks Dept., 377 U.S. 184 (1964) 14

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 14

People ex rel. Maciuba v. Cheston, 25 Ill.App.3d 224, 323 N.E.2d 40 (1st Dist. 1974) 15

Quality Foods v. Latin American Agribusiness Development Corp., 711 F.2d 989 (11th Cir. 1983) 20

Safeco Insurance Co. of America v. Guyton, 692 F.2d 551 (9th Cir. 1982) 19

Sparks v. Hershey, 661 F.2d 30 (3d Cir. 1981) ... 22

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 11, 14, 16, 17, 22

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 12, 13, 21

Verdegaal Brothers, Inc. v. Union Oil Co. of California, 750 F.2d 947 (Fed. Cir. 1984) 21

Constitutional Provisions

U.S. Const. art. III, sec. 2, cl. 1 ..... 2, 11, 19

U.S. Const. amend. VIII 8, 9

U.S. Const. amend. XI ..... *passim*

Statutes

Ill. Rev. Stat. ch. 37, par. 439.8(a) 16
Ill. Rev. Stat. ch. 37, par. 439.8(d) 16
Ill. Rev. Stat. ch. 38, par. 1003-7-4 ..... 7, 16
Ill. Rev. Stat. ch. 127, par. 801 16
28 U.S.C. §1254(1) 2

Federal Rules

Rule 43(c) of the Federal Rules of Appellate Procedure 15
Rule 25(d)(1) of the Federal Rules of Civil Procedure 15
Rule 54(b) of the Federal Rules of Civil Procedure . 8

In The

Supreme Court of the United States

October Term, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 645 (7th Cir. 1985) and is reproduced in the Appendix at App. A-1. The opinion of the United States District Court for the Southern District of Illinois is not reported; it is reproduced in the Appendix at App. D-1.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 17, 1985. On January 2, 1986 both plaintiffs and defendants timely filed petitions for rehearing with suggestion for rehearing *en banc*. Both petitions were denied on February 5, 1986. (App. B-1). This Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

It is petitioners' position that the Court of Appeals by virtue of Article III and the Eleventh Amendment to the United States Constitution lacked jurisdiction over plaintiffs' pendent state claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Ill.Rev.Stat. ch. 37, par. 439.8 provides:

> The [Illinois] court [of claims] shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the state founded upon any law of the State of Illinois, or upon any regula-

tion thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation.

(b) All claims against the state founded upon any contract entered into with the State of Illinois.

(c) All claims against the state for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee

of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act".

(g) All claims filed pursuant to the Crimes Victims Compensation Act.

(h) All claims pursuant to the "Illinois National Guardsman's and Naval Militiaman's Compensation Act".

(i) All claims authorized by Section 14.1(a) of the Illinois Administrative Procedure Act for the expenses incurred by a party in a contested case on the administrative level.

Ill.Rev.Stat. ch. 38, par. 1003-7-4 provides:

The Department [of Corrections] shall establish rules and regulations for the protection of the person and property of employees of the Department and every committed person.

Ill.Rev.Stat. ch. 127, par. 801 provides:

Except as provided in the "Illinois Public Labor Relations Act", enacted by the 83rd General Assembly, or except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named", filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

STATEMENT OF THE CASE

1. Claims Brought By The Prisoners

This case arises out of an accidental prison bus fire on November 29, 1979. Twenty-one prisoners filed several complaints which were eventually consolidated in the United States District Court for the Southern District of Illinois.

Each prisoner brought a civil rights claim against six employees and officials of the Illinois Department of Corrections. At the end of a three-week trial in October, 1984, the jury exonerated the three prison guards (i.e., William M. Hartgrove, James A. Krug, and John B. Tipton) who had been in charge of the prison bus on the day of the fire. The prisoners filed notices of appeal to the Court of Appeals seeking to appeal the jury findings in favor of the prison guards; however, the prisoners presented no argument contesting the validity of the jury verdicts. Accordingly, the Court of Appeals held that the prisoners had failed to appeal the civil rights jury verdicts in favor of the prison guards. (App. A-15; 780 F.2d at 655)

The jury found defendants Gayle M. Franzen, former Director of the Illinois Department of Corrections; Dennis J. Wolff, former Warden of the Joliet Correctional Center; and Richard R. Hert, former Chief of Security for the Joliet Correctional Center, liable in the total amount of $561,000 for actual and punitive damages on the civil rights claims. On appeal, the Seventh Circuit reversed the jury verdicts against the three administrative officials. The Court of Appeals held that there was "no evidence" of any wrongdoing by Director Franzen. (App. A-5; 780

F.2d at 650). As to the other two officials, the Court of Appeals held that the security modifications to the prison bus "were reasonable." (App. A-14; 780 F.2d at 654) Moreover, the Court of Appeals found that even six years after the accident "it is still not clear what the defendants should have done" to avert the possibility of harm. (App. A-13; 780 F.2d at 654)

The prisoners also brought pendent negligence claims; some of the prisoners also brought willful and wanton misconduct claims. Six of the prisoners sued all six defendants on pendent state claims; the remaining fifteen prisoners sued only four of the defendants on pendent claims.[1]

Furthermore, certain of the prisoners sued Prevost Car, Inc., the manufacturer of the bus, on a products liability claim that Prevost had manufactured its bus in an unreasonably dangerous and defective condition. The prisoners' product liability claims against Prevost were severed from the remainder of the case. Some currently remain pending before the District Court awaiting trial.

All of the foregoing claims were brought in the United States District Court. In addition to the federal court litigation, nineteen of the twenty-one prisoners initiated lawsuits directly against the State of Illinois in the Illinois Court of Claims based upon the same accident which is

[1] Plaintiffs Long, Moffett, J. Tirrell, T. Tirrell, Leatherwood, Foster, Lathrop, S. Tirrell, Faulkner, Campbell, Hurrins, Brown, Quaco, Walker, and Rucker never sued Dennis Wolff or Richard Hert on any pendent state law claim. (See complaints at R. 16 and R. 39).

the subject of this case.[2] Several of the prisoners also filed state court complaints in Livingston County, Illinois Circuit Court alleging product liability and negligence claims against the bus manufacturer's agent and the corporation that installed the security modifications on the bus. (Exhibits B and C to Defendants-cross-appellees' motion filed in the Court of Appeals on October 18, 1985).

2. Proceedings On The Pendent Claims In The District Court.

Plaintiffs sued Gayle Franzen "in his capacity as Director of the Illinois Department of Corrections." The other defendants were sued in their official capacity by designating each named defendant by job title. The same designations appear in the part of the complaint that asks for damages. (App. E-12) Moreover, plaintiffs based their state law claims on Ill.Rev.Stat. ch. 38, par. 1003-7-4 which imposes statutory duties upon the Department of Corrections, not individual corrections employees or administrators. That provision in its entirety states as follows:

> "The Department shall establish rules and regulations for the protection of the person and property of employees of the Department and every committed person."

The gist of plaintiffs' complaints is that the three senior administrative corrections officials failed to promulgate adequate prison bus regulations and the three prison

---

[2] Nineteen of the prisoners filed the required Illinois Court of Claims' notice of claim for personal injuries. (Exhibit A to Defendants-cross-appellees' motion filed in the Court of Appeals on October 18, 1985; see e.g., App. F-9). One of those nineteen prisoners filed a complaint in the Illinois Court of Claims. (App. F-1).

guards failed to adequately enforce those departmental regulations which did exist.

The corrections officials and employees moved to dismiss the pendent state claims on the basis of the Eleventh Amendment jurisdictional bar. The District Court Judge, Judge William L. Beatty, who prior to his tenure as a federal judge served as an Illinois state court judge for eleven years, agreed with defendants that the determination as to who is the real party in interest on a pendent state claim is governed by state law. Applying Illinois law, the District Court held that the State (rather than the individually named defendants) is the real party in interest. Accordingly, on April 18, 1984 the District Court dismissed the prisoners' pendent claims on Eleventh Amendment grounds. (App. D-1).

The prisoners never sought leave to amend their complaint to allege that the prison officials and employees were acting outside the scope of their employment.

At the start of the civil rights trial on October 1, 1984, all twenty-one plaintiffs asked the District Court to reconsider its April 18, 1984 interlocutory ruling which dismissed the pendent state law claims. (Tr. 36-37) Again on October 12, 1984, the prisoners asked the District Court to reinstate the state law claims. (Tr. 1003-1004). The District Court held that it would not be "practical" to add state law claims in this Eighth Amendment civil rights case. (Tr. 1004).

On February 1, 1985 the District Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, certified the civil rights and pendent state claims judgments for an immediate appeal. (App. C-1).

3. The Court Of Appeals' Decision On The Pendent Claims.

The Seventh Circuit held that for purposes of determining whether the Eleventh Amendment bar applies, the issue of whether the State of Illinois (rather than individual state officials) is the real party in interest is governed by federal law for both the civil rights and pendent state claims. The Court held:

> "That leaves only the question whether the judge was right to dismiss the pendent claim. He thought it barred by the Eleventh Amendment. But if, as he and we believe, the civil rights claim was brought against the defendants in their individual capacities, we can think of no reason for believing that the pendent negligence claim was brought against them in their official capacities . . ." (App. A-16; 780 F.2d at 656)

The Seventh Circuit next considered the District Court's suggestion that the pendent claims would have been dismissed anyway because a jury in a case with multiple plaintiffs and defendants might become confused if it had to consider each prison officials' liability under both Eighth Amendment and negligence standards. (*Id.*) The Court of Appeals held that the trial of twenty-one cruel and unusual punishment claims together with twenty-one negligence claims "has never been thought a source of serious confusion." (*Id.*) The Court of Appeals further held that the District Court had grossly abused its discretion in dismissing the pendent state claims in that there was almost a complete factual overlap between the federal and state claims. The Court stated:

> "while the district judge has a broad discretion in making what amounts to a managerial judgment on whether to allow a plaintiff to bring one case in federal court or force him to litigate his state claim in

> state court, we cannot uphold an exercise of discretion so flawed as the one before us." (App. A-16-17; 780 F.2d at 656)

Finally, the Court of Appeals held that inasmuch as it was uncertain as to whether the limitations period for the pendent state claims had expired, the pendent state claims must be reinstated as to all six prison officials and employees. The prisoners' failure to appeal the District Court's dismissal of the underlying federal claims against the three prison guards was not a jurisdictional bar to reinstating the pendent state claims against those guards. (App. A-18; 780 F.2d at 657) The Court held:

> "With regard to retention of a pendent claim in order to prevent the bar of the statute of limitations from falling, it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial (as in the case of the three guards) or after appeal (as in the case of the three officials who are the appellants)." (*Id.*)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO RESOLVE WIDELY CONFLICTING DECISIONS CONCERNING RECURRING ELEVENTH AMENDMENT AND ARTICLE III JURISDICTIONAL ISSUES AS WELL AS SET FORTH THE PROPER SCOPE OF REVIEW OF DISCRETIONARY DISTRICT COURT DECISIONS DISMISSING PENDENT STATE CLAIMS.

The effect of the Seventh Circuit's decision is to permit State of Illinois prisoners to sue state officials in federal court even though lawsuits on the identical claims against the same officials may not be brought in Illinois state courts of general jurisdiction. Although the prisoners may sue the State of Illinois in the Illinois Court of Claims, and indeed some have done so, punitive damages are not available in that forum. cf. *Laningham v. United States*, 2 Cl. Ct. 535, 558 (1983) (punitive damages against United States not allowed). Consequently, the Seventh Circuit's decision encourages a practice of forum shopping in order to obtain punitive damages. Therefore, the effect of the Seventh Circuit's decision is to turn the clock back 50 years to the days before this Court's *Erie R. Co. v. Tompkins* (304 U.S. 64, 74 (1938)) decision rejected the "mischievous results" of the *Swift v. Tyson* (41 U.S. (16 Pet.) 1 (1842)) doctrine.

Second, the Court of Appeals' decision holding that for purposes of reinstating previously dismissed pendent state claims it does not matter that the underlying federal claims against the defendants were not appealed to the Court of Appeals conflicts with this Court's subsequent decision in *Bender v. Williamsport Area School District*, 475 U.S. ____, 106 S.Ct. 1326 (1986) (appeal dismissed for want of jurisdiction).

Third, the Seventh Circuit held the District Court's decision declining to exercise jurisdiction over pendent state claims based upon practical considerations to be clearly "flawed." (App. A-17; 780 F.2d at 656). The Court of Appeals set forth a virtual ironclad rule requiring the District Court to retain jurisdiction over pendent claims wherever a substantial factual overlap exists between the federal and state claims. Not only does this result conflict with the tenor of broad District Court discretion prescribed in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966), it permits plaintiffs to try state tort claims in federal court on the basis of pendent jurisdiction simply by asserting a weak, yet triable, federal claim in their complaint. Thus, while this Court has made clear that state tort claims must not be allowed to enter the federal courthouse through the front door of federal claim jurisdiction (*Estelle v. Gamble*, 429 U.S. 97, 107 (1976)), the Court of Appeals has encouraged plaintiffs to enter through the side door of pendent claim jurisdiction despite the lack of merit in plaintiffs' underlying federal claims.

Pendent state claims may potentially be filed in virtually any civil rights case. Civil rights claims represent over twenty-nine percent of the civil caseload of the United States Court of Appeals (calculated from statistics in the Annual Report of the Director of the Administrative Office of the U.S. Courts for the period ended June 30, 1985; Appendix 1, Table B-1A). The actual pervasiveness of pendent jurisdiction is likely to be much greater since pendent state claims are obviously not limited to cases having federal civil rights claims as the main claims; they may potentially supplement almost any federal claim. Consequently, this Court should exercise its supervisory authority to resolve the recurring unsettled jurisdictional issues presented by this case.

I.

THE LOWER COURT'S HOLDING THAT FEDERAL LAW GOVERNS WHETHER A STATE IS THE REAL PARTY IN INTEREST ON STATE LAW CLAIMS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND LEADS TO A DIFFERENCE IN SUBSTANTIVE OUTCOME DEPENDING UPON THE FORUM CHOSEN BY PLAINTIFFS.

A. Widely Disparate Holdings Exist Among The Lower Courts And This Court Concerning Whether The State Is The Real Party In Interest In The Context Of State Law Claims.

Although it is beyond dispute that a federal court is "bound to apply state law" to pendent state claims (*United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)), the Circuits are split as to whether federal or state law governs the real party in interest issue in the context of the Eleventh Amendment immunity bar. The Court of Appeals below held that federal law governs. *Duckworth v. Franzen*, 780 F.2d 645, 656 (7th Cir. 1985) (App. A-16) (real party in interest issue same for state law claims as for federal civil rights claims). The Third Circuit also expressly held that the issue is governed by federal law. *Harris v. Pennsylvania Turnpike Commission*, 410 F.2d 1332, 1333-34 n. 1 (3d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970). The Ninth Circuit held that federal courts may consider state decisions but the issue is ultimately one which the federal courts must answer. *DeLong Corp. v. Oregon State Highway Commission*, 233 F.Supp. 7, 10 (D. Ore. 1964), *aff'd*, 343 F.2d 911, 912 (9th Cir.), *cert. denied*, 382 U.S. 877 (1965). The Fifth Circuit held that federal courts must look to state law for guidance. *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 828 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972). The Tenth Circuit held state law is decisive. *Korgich v.*

Regents of New Mexico School of Mines, 582 F.2d 549, 551 (10th Cir. 1978).

In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984) this Court noted that its prior decisions as to whether the State is the real party in interest "have not been entirely consistent." In *Pennhurst*, however, no party questioned that the state officials in that case were acting in their official capacity. (465 U.S. at 109 n. 17). In earlier decisions this Court squarely held that the Eleventh Amendment issues of consent (*Palmer v. State of Ohio*, 248 U.S. 32, 34 (1918)) and waiver (*Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 467 (1945)) should be governed by state law where state law otherwise applied. Compare *Parden v. Terminal R. of Alabama State Docks Dept.*, 377 U.S. 184, 194-96 (1964) (Eleventh Amendment waiver issue governed by federal law where case involved federal legislation concerning amenability to suit). Moreover, this Court in *Ford Motor Co.* applied state law to the real party in interest question where state concerns were at issue. 323 U.S. 459, 462-64 (1945).

B. The Lower Court's Holding Returns The Litigation Of Pendent State Claims Against State Employees To The Days When Forum Shopping Prevailed Under *Swift v. Tyson*.

The Seventh Circuit's holding that federal law must govern the real party in interest issue in the context of determining whether Eleventh Amendment immunity applies leads to a difference in outcome depending upon the forum chosen by the plaintiffs. It permits prisoners to sue state prison officials in federal court on state claims where the identical lawsuit against the same officials would not be permitted in Illinois courts of general jurisdiction. Under

Illinois law, the State of Illinois must be held to be the real party in interest unless the complaint alleges the named state employees acted maliciously and outside the scope of their authority. *Hoffman v. Yack*, 57 Ill.App.3d 744, 748, 373 N.E. 2d 486, 490 (5th Dist.), *leave to appeal denied*, 71 Ill.2d 603 (1978); *People ex rel. Maciuba v. Cheston*, 25 Ill.App.3d 224, 323 N.E. 2d 40 (1st Dist. 1974). Indeed, even if a plaintiff alleges that a claim has been brought against a named defendant individually, that is not sufficient to make the claim one against the individual rather than the State. In the absence of an allegation of wrongful conduct outside the scope of the employee's authority, the real party in interest is the State.[3]

Moreover, the issue of state indemnification of state employees, discussed by the Court of Appeals, is wholly separate from and independent of the real party in interest determination as set forth in *Hoffman v. Yack* and *People ex rel. Maciuba v. Cheston*. Petitioner state employees and officials in this case no longer rely on the Illinois state employees indemnification act as a basis for Eleventh Amendment immunity.

---

[3] Illinois law focuses on whether the allegedly wrongful conduct is claimed to be outside the employee's scope of authority rather than the technical issue of whether the claim has been plead against the state employee in his official or individual capacity. Accordingly, the Seventh Circuit's discussion (App. A-5; 780 F.2d at 650) of the alleged requirement to substitute named officials pursuant to Fed.R.Civ.P. 25(d)(1) or Fed.R.App. P. 43(c) is not germane to pendent claims under Illinois law. That is, the Seventh Circuit erroneously relied upon federal rules even though the applicable law in the context of a pendent claim is state law. In any event, those rules by their terms provide for automatic substitution of defendants; they further provide that no consequences follow from the failure to move to substitute the named defendants. *Brandon v. Holt*, 469 U.S. ____, 105 S.Ct. 873, 877 & n. 18 (1985).

Respondent prisoners' pendent state claims do not allege that petitioner prison officials and employees acted outside the scope of their authority. To the contrary, the prisoners rely on the statutory authority of the Illinois Department of Corrections (Ill.Rev.Stat. ch. 38, par. 1003-7-4) in attempting to allege pendent state claims against these Illinois corrections officials and employees. Therefore, plaintiffs could not bring the very state claims alleged in this case in a state court of general jurisdiction. Rather, such state law claims must be brought against the State of Illinois in the Illinois Court of Claims where punitive damages are not available. Under Illinois law, the State of Illinois may only be sued in the Illinois Court of Claims because that court has exclusive jurisdiction of claims brought against the State based upon a violation of Illinois law or departmental regulations or upon claims sounding in tort. (Ill.Rev.Stat. ch. 37, pars. 439.8(a), 439.8(d); ch. 127, par. 801).

Consequently, the Seventh Circuit's decision in this case permits prisoners to obtain punitive damages on state law claims in federal court although punitive damages are not obtainable in any Illinois court. Thus, the unfortunate result of the Seventh Circuit's decision is to return litigation of state law claims against state officials to the days when forum shopping prevailed during the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

It was just such evils as rampant forum shopping and the consequent inequitable administration of state law that caused this Court nearly fifty years ago to reject the politically and socially defective *Swift v. Tyson* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938). With only minor paraphrasing, Justice Brandeis' words written on behalf of this Court in *Erie* aptly express the unfairness of the practical results of the Seventh Circuit's decision:

> "*Swift v. Tyson* introduced grave discrimination by [prisoners] against [prison officials]. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the [prisoner]." (*Id.*).

C. This Court's Concern In *Erie R. v. Tompkins* With Mischievous Results Applies Even More Strongly To The Sensitive Issue Of A State's Duty To Provide Adequate Prison Security.

The *Erie* case dealt with a personal injury claim between two private parties. It did not concern the sensitive and delicate issues raised by a federal court's rendering judgments in hindsight as to how state prison officials should have balanced the questions of security and safety in transporting dangerous felons across the state's highways. Indeed, on the day of the accident in this case, the bus was carrying prisoners whose felonies included 8 murders, 7 armed robberies, 4 armed violence convictions, 3 rapes, 1 aggravated kidnapping, and 1 deviate sexual assault. (Tr. 238-39). Moreover, there had been a long history of escapes from Illinois prison buses. (App. A-14; 780 F.2d at 654). The security procedures at issue in this case had to take into account the legitimate safety needs of the community, the bus driver, the guards, and the other prisoners. (*Id.*) Accordingly, the Court of Appeals held that even six years after the accident "it is still not clear what the defendants should have done" to avert the possibility of harm. (App. A-13; 780 F.2d at 654).

Consequently, the Seventh Circuit's decision is particularly unfortunate for prison officials who should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed

to preserve internal order and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

To allow prisoners to obtain punitive damages on pendent state claims in federal court where punitive damages are not obtainable in any State of Illinois court conflicts with this country's basic values of federalism and comity which underlie our dual sovereignty system of government.

This Court should grant this Petition and issue a Writ of Certiorari in order to resolve the issue of whether a federal court should render real party in interest determinations in the context of pendent state claims against state officials which result in the application of substantive law in federal court directly at odds with applicable state law.

II.

THE COURTS OF APPEALS REQUIRE THIS COURT'S GUIDANCE CONCERNING THE CONSTITUTIONALITY OF REINSTATING PREVIOUSLY DISMISSED PENDENT CLAIMS WHERE THE UNDERLYING FEDERAL CLAIMS HAVE NOT BEEN APPEALED.

The jury found in favor of the three prison guards; accordingly, the District Court dismissed the prisoners' federal claims against these three defendants. The prisoners never perfected their appeal against the guards. Thus there were no federal claims against the guards pending before the Court of Appeals. The prisoners, however, did appeal the federal claims against the three administrative officials and the state law claims as to all six corrections defendants.

The Seventh Circuit decision reinstated the pendent state claims as to all six defendants including the three guards against whom there were no longer any underlying federal claims pending. The Court of Appeals held (App. A-18; 780 F.2d at 657):

> "it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial . . . or after appeal."

This result is in conflict with the principle set forth in *Safeco Insurance Co. of America v. Guyton*, 692 F.2d 551, 556 (9th Cir. 1982): "The existence of pendent jurisdiction should be re-evaluated throughout the pendency of litigation." The Ninth Circuit expressly held that the failure to appeal the District Court's dismissal of a federal claim precluded the Court of Appeals from permitting pendent or ancillary jurisdiction over a nonfederal claim.

Moreover, after the Seventh Circuit's decision in this case, this Court decided *Bender v. Williamsport Area School District*, 475 U.S. ____ , 106 S.Ct. 1326 (1986). In *Bender* this Court rejected the proposition that wherever Article III jurisdiction exists in the District Court, the Court of Appeals may ignore the issue of jurisdiction on appeal. This Court's *Bender* decision made clear that compliance with the strict requirements of Article III are just as necessary on appeal as they are in the District Court. (106 S.Ct. at 1335) Thus, the Seventh Circuit's decision holding that for purposes of pendent jurisdiction it does not matter that the federal claims against the guards were not pending in the Court of Appeals directly conflicts with this Court's decision in *Bender*.

Furthermore, the Seventh Circuit's implicit holding that the Article III jurisdictional requirement may be relaxed when the state statute of limitations may have expired (App. A-18; 780 F.2d at 657) is in conflict with the Fourth Circuit's decision in *Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Maryland*, 756 F.2d 986, 994 n. 14 (4th Cir. 1985) which held that there is no rule whereby district courts must exercise pendent jurisdiction over time-barred state claims. It is also in conflict

with the Eleventh Circuit's decision in *Quality Foods v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 1000 (11th Cir. 1983) which held that it is not the function of a federal court to rescue a party's pendent claims from the possible expiration of the limitations period. By contrast in this case, back in 1980 nineteen of the twenty-one respondent prisoners timely commenced Illinois Court of Claims litigation concerning the same accident which is the subject of this action. (Exhibit A to Defendants-cross-appellees' motion filed in the Court of Appeals on October 18, 1985).

This Court should grant this Petition for a Writ of Certiorari in order to resolve whether the Court of Appeals may reinstate previously dismissed pendent state claims where plaintiffs have failed to appeal the District Court's dismissal of the underlying federal claims to the Court of Appeals. Alternatively, petitioners pray that this Court grant this Petition and either summarily reverse the decision of the Seventh Circuit reinstating the pendent state claims against prison guards William M. Hartgrove, James A. Krug, and John B. Tipton or vacate the judgment of the Seventh Circuit concerning the pendent claims and remand this case for reconsideration in light of this Court's decision in *Bender v. Williamsport Area School District.*

III.

CONFUSION EXISTS AMONG THE COURTS OF APPEALS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED A DISTRICT COURT'S DECISION TO DISMISS PENDENT STATE CLAIMS FOR PRACTICAL REASONS.

Although the Seventh Circuit acknowledged that the District Court is to be accorded broad discretion in deciding whether to retain pendent claims, the Court of Ap-

peals found the District Court's exercise of discretion in this case to be clearly "flawed." (App. A-17; 780 F.2d at 656). The Seventh Circuit established virtually an absolute rule that wherever there is "almost complete factual overlap between the main and pendent claims" the pendent claims must be retained by the District Court. (App. A-16; 780 F.2d at 656) The lower court also held that potential jury confusion arising from differing standards of liability "has never been thought a source of serious confusion." (*Id.*)

These results conflict with the broad principles of discretionary pendent jurisdiction set forth by this Court in both *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966) and *Moor v. County of Alameda*, 411 U.S. 693, 715-17 (1973). In *Moor* this Court, in affirming the District Court, emphasized that the trial judge is to be accorded broad discretion where he or she declines to exercise pendent jurisdiction. In particular, this Court noted that "the likelihood of jury confusion" was an "entirely appropriate" point for the District Court to consider. (*Id.* at 716). Under Illinois law, negligence claims are decided under the doctrine of comparative negligence which greatly complicates the jury instructions. See *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981).

Also directly at odds with the Seventh Circuit is the Federal Circuit's standard of review of a District Court's decision not to exercise pendent jurisdiction. The Federal Circuit allows the District Court judge a wide degree of latitude; the District Court may properly be found to have abused its discretion only if "no reasonable man" would take the view adopted by the trial court. *Verdegaal Brothers, Inc. v. Union Oil Co. of California*, 750 F.2d 947, 952 (Fed. Cir. 1984) (patent and state unfair competition case). On the other hand, the *Verdegaal* decision notes some lower court authority in favor of exercising pendent jurisdiction in federal civil rights actions. (*Id.* at 951) See e.g.,

Sparks v. Hershey, 661 F.2d 30 (3d Cir. 1981) (reversed district court's dismissal of state claims pendent to federal civil rights claim). Yet this Court rejected pendent jurisdiction in the civil rights case of *Moor v. County of Alameda*.

The lower courts are in need of this Court's guidance concerning the appropriate standard for the District Court's decision whether to exercise pendent jurisdiction as well as the proper degree of deference to be accorded by the Court of Appeals in reviewing the District Court's discretionary decision to decline pendent jurisdiction for practical reasons.

CONCLUSION

This Court should resolve whether state or federal law governs the determination of the real party in interest issue where pendent claims are brought against state officers. The lower court's resurrection of the politically and socially defective *Swift v. Tyson* doctrine directly conflicts with the values underlying our country's dual sovereignty system of government. Moreover, this Court should resolve the important Article III jurisdictional issue as to whether the existence of pendent jurisdiction must be reevaluated throughout the pendency of the litigation or merely at the time of the initial filing of the complaint in the District Court. Finally, the lower courts require this Court's guidance as to whether the District Court may properly rely on practical reasons in declining to exercise pendent jurisdiction despite substantial factual overlap between plaintiffs' federal and state claims.

Resolution of the three jurisdictional issues raised in this case will resolve questions arising in a large percentage of the entire federal civil caseload.

For the foregoing reasons, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari and allow full review of the Seventh Circuit's decision reinstating the pendent claims. Alternatively, petitioners pray that this Court grant their Petition and either summarily reverse the judgment of the Seventh Circuit reinstating the pendent state claims, or vacate the judgment of the Seventh Circuit as to the reinstatement of the pendent claims and remand this case for reconsideration in light of this Court's recent decision in *Bender v. Williamsport Area School District.*

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 917-5694

* Counsel of Record